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No. 16101

In the

Supreme Court of the United States

No. 16101

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

J. M. KIRKLAND, *et al.*,
Appellees.

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, *et al.*,
Appellees.

Appeals from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

STATEMENT AS TO JURISDICTION

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INDEX

		Page
Opinion Below	Appendix A	59
Jurisdiction		2
Statutes of the State Involved		2-3
Date of Judgment and of Application for Appeal		3
Cases Believed to Sustain Jurisdiction		3
Raising the Federal Questions		4-6
Questions Presented		6-8
Statement		8-11
The Questions Presented Are Substantial		11
Question 1(1)		11-14
Question 1(2)		14-16
Question 1(3)		16-19
Question 2		19-24
Question 3		24-26
Question 4		26-30
Question 5		30-33
Question 6		33-38
Question 7		38-42
Question 8		43-53
Question 9		54-55
Conclusion		56

	Page
Abilene State Bank v. U. S. Fidelity & Guaranty Co., 37 S. W. 2d 815	37
Allen v. Stovall, 63 S. W. 863	4, 40, 42
Article 1853 of the R. C. S. of 1895	2
Article 2557 of the R. S. of 1895	15
Article 3398 of the R. C. S. of 1925	13
Article 3553 of the R. C. S. of 1925	45
Article 3731a, Sec. 5 of the R. C. S. of 1925	15
Article 4106	17
Article 4108	13
Article 4149 of the R. C. S. of 1925	13
Article 4163 of the R. C. S. of 1925	21
Article 4205 of the R. C. S. of 1925	27
Article 4216 of the R. C. S. of 1925	32
Article 4220 of the R. C. S. of 1925	32
Article 4291 of the R. C. S. of 1925	2, 17
Article 5518 of the R. C. S. of 1925	45
Article 5528 of the R. C. S. of 1925	3, 40
Arnold v. Cauble, 49 Tex. 527	50
Bain, et al. v. Coats, et al., 244 S. W. 130	41
Benson v. Harrell, 324 S. W. 2d 620	55
Bishop v. Creek, 199 S. W. 367	29
Blackwood v. Blackwood's Estate, 47 S. W. 483	16
Blackwood v. Blackwood's Estate, Sup. Ct., 49 S. W. 1045	15
Boucher v. Wallis, 296 S. W. 2d 519	16, 33
Buss v. Smith, 125 S. W. 2d 712 and 714	22

Page

Campsey v. Jack County Oil & Gas Association, 328 S. W, 2d 912 48

City of Tyler v. First National Bank of Beaumont, 46 S. W. 454 25

Commander v. Bryan, 123 S. W. 2d 1008 26, 29, 33, 36

Cobb v. National Bank of Decatur, 42 S. W. 770 53

Connecticutt Mutual Life Ins. v. Sprately, 172 U. S. 602, 43 L. Ed. 569 23

Cotton v. Menefee, 237 U. S. 189, 59 L. Ed. 910 23

12 C. J. p. 1226, Sec. 1001 23

16A C. J. S. p. 435, Sec. 625 16

16A C. J. S. p. 835 14, 33, 42

28 C. J. p. 1296, Sec. 499 7 36

33 C. J. Sec. 34 and 37, p. 1072 and 1076 18

34 C. J. 531, 532 13

34 C. J. 533, Sec. 836 C 18

39 C. J. p. 371, Sec. 206 38

Crier v. Cowden, 251 S. W. 822 25

Davis v. Stanford Mill & Elevator Co., 260 S. W. 1081 14

De Pauw University v. Brunk, 285 U. S. 527, 76 L. Ed. 924 36

Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107 5

Ford v. Wheat, 36 S. W. 2d 712, Sup. Ct. 41, 42

Gallemore v. Owen, 69 S. W. 2d 469 16, 45

Gann v. Kern, 249 S. W. 878 37

Garza v. De Montalvo, 217 S. W. 2d 988 46

Grant v. Ellis, 50 S. W. 2d 1093, Sup. Ct. 13, 29

	Page
Harrison v. Barngrover, 72 S. W. 2d 971	25
Hornsby v. Hornsby, 70 S. W. 2d 489	22
Huling v. Moore, 194 S. W. 188	45
Hyman v. Muller, 62 A. 2d 221	16
Joyner v. Christian, 113 S. W. 2d 1229	51
Kelsey v. Tristler, 74 S. W. 66	16
Kelly v. Neal, 111 S. W. 2d 1122	45
King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 74 L. Ed. 801, 48 S. Ct. 489	3
Lamesa High School District v. Speck, 253 S. W. 2d 315	18
Lasater v. Ramirez, 212 S. W. 935	51
Loving v. Clark, 228 S. W. 590 and 593	45
Marlow v. Lacy, Sup. Ct., 2 S. W. 52	41, 42
Martin v. Augadahl, 247 U. S. 142	26
Martinez v. Guierrez' Heirs, 172 S. W. 766	41
Massie v. De Shields, 62 S. W. 2d 322	41, 42
Maverick v. Burney, 32 S. W. 512	50
Minchew v. Case, 143 S. W. 366, Texas	37
Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760	6
Neal v. Holt, 69 S. W. 2d 603	21, 25, 33
Norse v. Shackelford, 9 F. 2d 907	22
O'Connor v. Vineyard, et al., 43 S. W. 55	25
Old Wayne Mut. Life Assoc. v. McDonough, 204 U. S. 8, 51 L. Ed. 345	19
Parker v. Bowers, 64 S. W. 380	29
Parker v. Campbell, 21 Tex. 763	37

	Page
Rediker v. Rediker, 221 P. 2d 1, 2 A. L. R. 2d 1152	16
Rolfe v. Swearingen, 241 S. W. 2d 236	55
Scoggins v. Lee, 92 S. W. 2d 1116	52
Senn v. Tile Layers Protective Union, 301 U. S. 467, 81 L. Ed. 1229	3
Simon v. Craft, 182 U. S. 427, 45 L. Ed. 1165	19
Simon v. Southern R. Co., 236 U. S. 115, 59 L. Ed. 492	19
Simpson v. Booth, 163 S. W. 2d 1080	28, 33
Sinsheimer v. Simonson, 107 F. 898, 184 U. S. 18, 46 L. Ed. 413	23
State v. Jones, 315 S. W. 2d 433	53
Stallings v. Hullum, 35 S. W. 2	14, 29
Stephens v. House, 248 S. W. 30	53
Stubbs v. Lowrey's Heirs, 253 S. W. 2d 312	47
14 Tex. Jur. 438, Sec. 627	41
21 Tex. Jur. p. 214, Sec. 9	18
21 Tex. Jur. 408, Sec. 130	42
25 Tex. Jur. Sec. 254, p. 693	36
25 Tex. Jur. p. 805 and 808, Sec. 307	13, 29
28 Tex. Jur. p. 144 and 145, Sec. 61	53
Thomas v. SW. Settlement & Development Co., 123 S. W. 2d 290	50
Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97	42
U. S. Brinkerhoff-Faris Trust & Savings Co. v. Hill., 281 U. S. 673, 74 L. Ed. 1107	14, 30

	Page
Wall v. Wall, 172 S. W. 2d 181	28
Watkins v. Certain-Teed Prod. Corp., 231 S. W. 2d 981	47
Whitfield v. Burrell, 118 S. W. 156	4, 40, 42
Wirch v. Nesbitt, 20 S. W. 128	41
Withers v. Patterson, 27 Tex. 491, Sup. Ct.	22, 25

In the

Supreme Court of the United States

No. 16104

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

J. M. KIRKLAND, *et al.*,
Appellees.

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, *et al.*,
Appellees.

Appeals from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

STATEMENT AS TO JURISDICTION

Appellants, William Birdwell and Lee Green, submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth, Texas,

in Cause No. 16104, affirming the summary judgment granted in favor of the bonding companies against plaintiffs, now appellants, and for all costs accrued therein against them, and also from a final judgment in trespass to try title, affirming mineral rights in favor of appellees.

THE OPINION BELOW

The opinion of the Court of Civil Appeals at Fort Worth, Texas, has been officially reported in *337 S. W. 2d 120.* A copy of said opinion is attached hereto as Appendix A.

JURISDICTION

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257(2) of Title 28 of the United States Code.

STATUTES OF THE STATE INVOLVED

The statutes of the State, the validity of which is involved, is *Article 4291 of the R. C. S. of 1925 of the State of Texas* and provides as follows: "Sureties on Bond to be Cited. Upon the filing of such application (for removal), the sureties upon the bond of such guardian shall be cited by personal service to appear and show cause why such application should not be granted." Also *Article 1853 of the Revised Statutes of 1895*, provides that "all such decisions, orders, decrees and judgments shall be entered on the records of the court during the term at which the same are rendered, and any such decisions, order or decree or judg-

ment shall be a nullity unless of record". And also, *Article 5528 of the R. C. S. of 1925*, provides: "All suits on the bond of any executor, administrator or guardian shall be commenced and prosecuted within four years next after the death, resignation, removal or discharge of such executor, administrator or guardian, and not thereafter."

In the alternative, if the appeal is improvidently taken, then appellants invoke *Rule 28 U. S. C. A., Sec. 2103*, when it is to be regarded as a petition for certiorari.

DATE OF JUDGMENT AND OF APPLICATION FOR APPEAL

The opinion and judgment of the Court of Civil Appeals at Fort Worth, Texas, was rendered on May 27, 1960, rehearing denied without a written opinion on June 24, 1960; writ of error denied by the Supreme Court of Texas, October 26, 1960, and motion for rehearing overruled on November 23, 1960. The application for appeal was presented and filed on February 21, 1961.

CASES BELIEVED TO SUSTAIN JURISDICTION

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

Senn v. Tile Layers Protective Union, 301 U. S. 467, 81 L. Ed. 1229;

King Mfg. Co. v. City Council of Augusta, 277 U. S. 100; 72 L. Ed. 801, 48 S. Ct. 489.

RAISING THE FEDERAL QUESTIONS

In the motion for rehearing in the Court of Civil Appeals, on Page 6 of said motion, and at the last paragraph of said page, the appellants stated: "Since the court held that the plaintiffs' cause of action against the bonding companies has been lost by limitation and that the period during which the plaintiffs should have filed their suit therefor was within four years after they reached their respective majorities * * * is in direct conflict with the Supreme Court case of *Allen v. Stovall, 63 S. W. 863,* * * * *Whitfield v. Burrell, 118 S. W. 156,* and all other cases on the subject; and * * * the decision is not due process of law, and repugnant to the 14th Amendment of the Constitution of the United States." And on Page 56 of said motion for rehearing, being the last page, the appellants stated: "That since the Court of Civil Appeals has failed to sustain the above and foregoing points of error, that said ruling and decision of this court is in conflict with each and every case cited under each point of error herein, and the same is not due process of law, and repugnant to and in violation of the 14th Amendment of the Constitution of the United States."

In its petition for writ of error in the Supreme Court of Texas, appellants specifically renewed their attack on the validity of the ruling of the Court of Civil Appeals in violation of the Fourteenth Amendment clause. In the second paragraph on the last page, 112, the appellants stated: "The Court of Civil Appeals has failed to sustain the above and foregoing points of error, and each of them, that said

ruling and decision of the Court of Civil Appeals is in conflict with each and every case cited under each point of error herein, and the decisions of the Court of Civil Appeals as heretofore set up in the petitioners' motion for rehearing in the Court of Civil Appeals, is depriving the petitioners of property without due process of law, and is repugnant to, and in violation of the Fourteenth Amendment of the Constitution of the United States."

And in the motion for rehearing in the Supreme Court of Texas, the attack again was renewed by appellants showing wherein both the Court of Civil Appeals and the Supreme Court erred and was in violation of the Due Process Clause of the F[illegible]teenth Amendment of the Constitution of the United [illegible]tes, which pages of said motion are on 31 and 32.

The [illegible]eral question was raised for the first time, and raised in time in the Court of Civil Appeals on a motion for a rehearing, which was the first opportunity to present the same after leaving the trial court. The construction placed upon the issues and questions by the Court of Civil Appeals trying the case was a surprise to the appellants herein, because the court's former decisions were at variance and in conflict with the decisions adopted by it at this time when the case was tried. This same principle is shown in *Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673, 74 L. Ed. 1107*, holding:

> "A federal question raised for the first time on petition for rehearing in the highest court of the State is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, at variance with a construction formerly adopted by it."

That the federal question was necessarily involved in the decision in the case at bar, and that the court could not have given the judgment or decree which they passed on without deciding it, because the record shows, an order or judgment of the court was obtained without citation, notice, appearance or waiver, and further shows that the orders and decrees of the court were void for lack of jurisdiction over the subject matter, which will all be shown in the consideration of the questions, all in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. *Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.*

QUESTIONS PRESENTED

1. Whether as applied to the Probate Court of Bell County's order removing the guardianship from Bell County, Texas, to Young County, Texas, in violation of the statutes is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States.

2. Whether the land in question, when it had already been sold, was the same in the possession and under the authority and jurisdiction of the guardian and probate court subject to contract and sale, and if such sale was void, would be in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the Probate Court of Young County, Texas, could order a sale of said land through the guardian's deed in confirmation and ratification of a former deed and conveyance not permitted by statute and violative of the Due

Process Clause of the Fourteenth Amendment of the Constitution of the United States.

4. Whether the guardian made a sale of said land and was benefitted and profited directly and indirectly in violation of the statute, was contrary to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

5. Whether the Probate Court of Young County, Texas, in making the sale of said land, ordered the conveyance to be made when the money was paid to the guardian in compliance with the order of the Court and statutes, which was not paid when the conveyance was made, nor thereafter, and caused a failure of consideration of the purchase price of said land, and rendered the sale void, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

6. Whether the suit on the Surety Companies' bond as applied to the appellants were liable to them on the ground that all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, were void, and estopped the bonding companies from questioning the jurisdiction of the court and the invalidity of the record, and an adverse ruling thereon was in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

7. Whether the suit on the surety companies' bond as applied to the appellants, was lost by limitation when the wards failed to bring suit on the bonds within four (4)

years after they reached their majorities, but did bring suit on the bonds less than four (4) years after the guardian died and before the guardianship closed; and an adverse ruling on same was violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

8. Whether the two deeds in question were void and the oil and gas mineral rights were severed from the land, give the appellants the right to acquire the said minerals thereunder and a decision adverse thereto is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

9. Whether appellants' motion for a summary judgment, supported by their affidavits, depositions, pleadings and records in the case, which showed no genuine issue of fact to be determined, and which motion was not controverted by the affidavits of the defendants, appellees, and a decision adverse to same is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT

This is a suit in the nature of a bill of review instituted by the appellants in the Probate Court of Young County, Texas, on the 25th day of February, 1955, setting up the fact that G. W. Birdwell, guardian of the appellants, had qualified as guardian in Bell County, Texas, and had illegally and without authority of law removed the said guardianship from Bell County to Young County, Texas. When

it was removed the guardian attempted to sell the land of 80 acres belonging to the wards, the appellants herein, through the Probate Court of Young County, Texas, and the appellants set up the fact that the probate court did not have jurisdiction over the land, neither did the guardian, for the guardian had already sold the land while he was suspended, and without an order of the probate court on August 1, 1913, and the said sale had never been set aside. The appellants further set up many invalid acts and unlawful conduct on the part of the guardian in the sale of said land, and among other things alleged and showed that the land was sold by said guardian by order of the court, report and confirmation order and the deed were executed by the guardian and delivered to the purchaser in violation of the order of the court and statutes in the failure of the purchaser to pay the consideration when the conveyance was made nor any time thereafter, and caused a total failure of consideration of the purchase price. Appellants further alleged and showed that the application to sell, order of sale, report of sale, and the confirmation order and all proceedings were void in said probate court, and asked the court to set them aside. On the trial of the case in the probate court on the 15th day of December, 1955, the probate court sustained the defendants' exceptions, pleas in abatement, and pleas to the jurisdiction, and overruled appellants' pleas in abatement to the jurisdiction of the court, whereupon the plaintiffs excepted and gave notice of appeal and duly effected their appeal to the District Court of Young County, Texas.

Upon the appeal to the said district court, the appellants renewed their plea in abatement to the jurisdiction of the probate court, and sought again to set aside all of the proceedings in said court. Also the appellants filed suit in the said District Court in trespass to try title on the 13th day of May, 1955, seeking to set aside the invalid deeds of the guardian, and for the possession and title to said land as their interest might appear, and in the alternative for a judgment against the bonding companies, for the defalcation of the guardian, and made a motion for summary judgment. In trespass to try title, the appellees plead adverse possession of three, five, ten and 25 year statute of limitation. The bonding companies urged special exceptions and the four year statute of limitations to the appellants' cause of action, and set up motion for summary judgment.

Furthermore, the said case was appealed from the probate court and the said trespass to try title both being in the district court were consolidated by the order of the court, and were set down for a pre-trial hearing on the 4th day of June, 1959, and at the pre-trial hearing, without any oral testimony being admitted by either side, the trial court, being of the opinion that the plaintiffs did not plead and show a cause of action, overruled all of their pleas to the jurisdiction of the court, their exceptions, and motions for summary judgment; but sustained all of the defendants' exceptions, and the bonding companies' motion for summary judgment, pleas in abatement and limitation pleas, whereas the appellants excepted and gave notice of appeal to the Court of Civil Appeals of Texas, for the Second Supreme

Judicial District at Fort Worth, and duly effected their appeal.

These federal questions were expressly passed upon by the Court of Civil Appeals at Fort Worth, Texas, because of the fact that said court found that the appellants' suit on the bonds was barred by the four-year statute of limitation in that the release of the sureties by the probate court's order was valid and subsisting. This ruling and decision is the same as holding that all of the proceedings, orders, judgments and releases of the Probate Court of Young County, Texas, are valid and subsisting, and all of the points of error and questions herein should be overruled, holding in effect that void orders and judgments are barred. To the same effect is the ruling of said Court of Civil Appeals with reference to the mineral rights set up in favor of appellants when they showed the court that both deeds were void, and the minerals were severed from the soil, and appellants should recover, but said court refused to hold the said orders and proceedings of the probate court and deed void, but valid and subsisting, which is shown under "Question 8".

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL:

QUESTION 1

In consideration of the first question, whether as applied to the Probate Court of Bell County's order removing the guardianship from Bell County, Texas, to Young County,

Texas, in violation of the statutes, repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(1) The removal order was void for the following reasons:

The American Bonding Company of Baltimore, appellee, made application to the Probate Court of Bell County, Texas, to be discharged from all liability for the future acts of said guardian; and in consideration of said application on the 4th day of April, 1910, the court ordered the guardian to give a new bond in the amount of $3,000.00 on or before the 20th day of April, 1910, "with surety or sureties to be approved by this court". A new bond was not given until the 16th day of August, 1913, a period of about three (3) years and 4 months, when the guardian had the court to approve on said day, a bond executed by the American Surety Company of New York in the sum of $2,500.00, when the guardian made application and attempted to sell said wards', appellants, real estate. That said guardian, on the 17th day of October, 1910, made application to remove the guardianship from Bell County, Texas, to Young County, Texas; and that thereafter, on the 5th day of December, 1910, the said court entered a purported order, removing the said guardianship from Bell County to Young County, Texas.

That since the American Bonding Company of Baltimore made application to be released from said bond as shown above, and since a new bond was not given for a period of about three (3) years and four (4) months on August 16,

1913, as aforesaid, the said guardian was disqualified and suspended when the purported removal order was made by the court on December 5, 1910. *Article 4149 of the R. S. of 1925 of the State of Texas*, provides as follows:

> "When a guardian has been required to give a new bond, he shall thereafter refrain from acting as such guardian except to preserve the property in his charge, until he gives such new bond and the same has been approved, as such guardian."

Article 3398 of the R. S. of 1925, also applies and provides as follows:

> "Functions of executor suspended; when an executor or administrator is required to give a new bond, the order requiring such bond shall have effect to suspend the powers of such executor or administrator, and he shall not thereafter pay out any money of said estate or do any other official act, except to preserve the property of the estate, until such new bond has been given and approved."

Also *Article 4108* applies and provides as follows:

> "Laws applicable, the provisions, rules and regulations which govern estates of decedents shall apply to and govern guardianships, whenever same are applicable and not inconsistent with any provision of this title."

"Disregard of Mandatory or Statutory Provision. * * * Indeed, as a general proposition, any judgment which ignores a prohibitive statute may be regarded as void and subject to collateral attack." *25 Tex. Jur. p. 805 and 808, Sec. 307.* In *Grant v. Ellis, 50 S. W. 2d 1093*, the Supreme Court of Texas held: "34 C. J. 531, 532. We quote and adopt the following rule announced by the above authority: 'Where the

Constitution or a statute absolutely prohibits a court from doing a particular act, the order or judgment of the court made or rendered in violation thereof is absolutely void for want of jurisdiction and may be assailed in a collateral proceeding'." The Supreme Court of Texas in *Stallings v. Hullum, 35 S. W. 2*, further held: "What is prohibited in law is as clearly invalid as if it had been declared void." "No judgment of a court affords due process of law if rendered without jurisdiction. A judgment is void for want of due process where the court exceeds its jurisdiction, as where it renders a judgment not authorized by the pleadings, evidence, or findings, or without service of process sufficient to bring the parties before the court." *Davis v. Stanford Mill & Elevator Co., 260 S. W. 1081, Texas; U. S. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107; 16 A C. J. S., p. 835 and 836, Sec. 625.*

(2) The removal order was, and is further void as follows:

Because it was never put in the minutes of the Bell County Court according to the law and statute. All of the records of Bell County Probate Court have been introduced in evidence, and nowhere can it be found among the records and papers of the case where the said order was entered into the minutes of the court, nor was it ever filed, nor was the order entered of record at any time; and consequently said purported order is a nullity and void. That the clerk of the Bell County Probate Court furnished a complete record and same appears in the statement of facts filed in this court, S. F. 41. All of the records were well preserved, and the clerk certified

thereto that after making a diligent search she did not find the said removal order from Bell County to Young County, Texas, in the minutes of the court, nor was it ever entered or filed of record in said court. This certificate is admissible by the said clerk, for *Article 3731a, Sec. 5 of the R. S. of Texas*, provides:

> "A written statement signed by an officer having custody of an official record, or by his deputy, that after diligent search no record or entry, of a specified tenor, is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contained no such record."

In the case of *Blackwood's Estate, 49 S. W. 1045*, the Supreme Court of Texas held: "Under Article 2557 of the Revised Statutes of 1895, provides all decisions, orders and judgments of the court in matters of guardianship shall be rendered and entered on the minutes of the court at a regular term thereof, and in open court, except in cases where it is otherwise specially provided. * * * We think, however, that Article 1853, which provides that 'all such decisions, orders, decrees and judgments shall be entered on the records of the court during the term at which the same are rendered, and any such decision, order or decree or judgment shall be a nullity unless of record', applies as well to proceedings in guardianship as to proceedings in estate of decedents. * * * Article 2558 provides that 'the provisions, rules and regulations which govern estates of decedents shall apply to and govern guardianships, whenever the same is applicable and not inconsistent with any of the provisions of this title'. * * *

And we see no reason why it should not be held that the provisions of the statute above quoted, rendering null and void those made in reference to estates of decedents if not entered upon the record, are not applicable to orders made in matters of guardianship." *Blackwood v. Blackwood's Estate, Court of Civil Appeals, 47 S. W. 483*, held: "All decisions, orders and judgments not entered on the records of the court are nullities." *Kelsey v. Tristler, 74 S. W. 66*, held: "Guardian's deed was absolutely void whether order of sale, and order confirming sale, if made, were not entered on records of court. *Gallemore v. Owen, 69 S. W. 2d 469.*" That all of the above quoted statutes in the *Blackwood* case were in effect when removal order was attempted to be made on or about December 5, 1910; *Boucher v. Wallis, 236 S. W. 2d 519.*

A void judgment is not due process of law. "Due Process of law is essential to a valid judgment, and a void judgment confers no rights under the due-process clauses." *16 A C. J. S. p. 435, Sec. 625; Cal. Rediker v. Rediker, 221 P. 2d 1, 2 A. L. R. 2d 1152; Hyman v. Muller, 62 A. 2d 221.*

(3) The removal order was void for the third reason, as follows:

That on or about the 17th day of October, 1910, the said guardian filed an application in Bell County Court to move the guardianship to Young County, Texas, without citing the defendant surety, the American Bonding Company of Baltimore to appear and answer therein. Upon the application for the guardian to transfer the guardianship from one county to

another, it is necessary to issue citation to the sureties on the bond, citing them to appear and show cause why such application should not be granted, according to *Article 4291 of the R. S. of 1925 of the State of Texas*, which provides: "Sureties on Bond to be Cited. Upon the filing of such application (for removal), the sureties upon the bond of such guardian shall be cited by personal service to appear and show cause why such application should not be granted." Said surety was never cited to appear, because all of the records of Bell County, Texas, were introduced in evidence, and the same does not appear in the records, and according to the clerk's certificate, S. F. 41, the said citation was never issued and served on said surety, neither did it waive service nor appear in court. Neither does the record show that on the application to remove said guardianship, was citation ever issued by the clerk or anybody else, nor was there any return shown upon the citation or copied into the minutes of the court in compliance with Article 4106 of the R. S. of 1925 of the State of Texas. In fact, the entire record affirmatively shows that the citation was never issued, and the certificate of the clerk shows transcript complete (S. F. 42). The record also shows that the said surety did not appear. According to said statute the issuance of notice is mandatory, and is a prerequisite to the exercise of the jurisdiction to move said guardianship from Bell County, Texas, to Young County, Texas.

In the case of *Williamson v. Owens* the court held:

> "It seems that the proceedings can be attacked collaterally if there was absence of notice, and the orders complained of were thereby void for want of jurisdic-

tion. 21 Tex. Jur. Sec. 9, p. 214, and cases therein cited. Generally a judgment without service is void." Rule 124 * * *. "According to the general rule, the judgment rendered by a court having no jurisdiction is a mere nullity and will be so held and treated whenever and for whatever purpose it is sought to be used." *33 C. J. Sec. 34 and 37, pp. 1072 and 1076.*

Again, "Want of Process or Service. In a personal action the issuance of process and the service thereof upon the defendant is necessary to confer jurisdiction upon the court, and if no process is issued, or if service is not made on defendant, the judgment will be void and subject to collateral attack, unless service is waived by voluntary appearance or otherwise." *34 C. J. p. 533, Sec. 836 C.* However, we finally found the purported removal order in the Young County Probate Court, several years after the removal of said guardianship, but do not know how it got there.

Furthermore, by the inspection of such judgment of removal we see that it is vulnerable to collateral attack for it does not cite notice or jurisdictional facts (Tr. 8). *Lamesa Rural High School District v. Speck, 253 S. W. 2d 315.* Also said guardian was otherwise disqualified to remove said guardianship as shown above under Question 1, Section 1, wherein it is shown that he failed to give bond according to law and the statutes and order of the court, and was disqualified and suspended and not permitted to act as guardian; and also under Question 1, Section 2, as above set out, the guardian was disqualified to act in not having the removal order in the minutes of the court according to law and the statutes.

Notice

"Notice to a party whose rights are to be affected by judicial proceedings is an essential element of due process." *Simon v. Southern R. Co., 236 U. S. 115, 59 L. Ed. 492; Old Wayne Mut. Life Assoc. v. McDonough, 204 U. S. 8, 51 L. Ed. 345; Simon v. Craft, 182 U. S. 427, 45 L. Ed. 1165.*

QUESTION 2

We come now to the consideration of the second question, whether the land in question, when it had already been sold, was the same in the possession and under the authority and jurisdiction of the guardian and the Probate Court of Young County, Texas, subject to contract and sale, and if such sale was void, would be in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

On August 1, 1913, George W. Birdwell and wife, Mollie Birdwell, executed a conveyance to J. M. Kirkland of Young County, Texas, without an order of the Probate Court, and while the said guardian, George W. Birdwell, was suspended and disqualified by the court of Bell County, Texas, on April 4, 1910; and that at said time of the conveyance the said land was owned by the wards, the appellants herein (S. F. 46). On August 27, 1913, the said guardian filed an application to sell said 80 acres of land through the Probate Court of Young County, Texas, being the same land as above shown that was sold by George W. Birdwell and wife, Mollie Birdwell, to J. M. Kirkland on August 1, 1913; that said

land was duly put through the regular channels of the Probate Court, and same was purported to be sold through the guardian to J. M. Kirkland, and a guardian's deed was purported to be executed on the 20th day of October, 1913 (S. F. 57). Both deeds were filed for record in the Deed Records of Young County, Texas, on the 24th day of October, 1913. The said deed of August 1, 1913, was never set aside and canceled when the guardian's deed was executed on the said 20th day of October, 1913. That said consideration was paid and to be paid by the purchaser, J. M. Kirkland, as stated in said deed of August 1, 1913, title was purported to be passed, as testified to by the deposition of J. M. Kirkland on March 18, 1955 (S. F. 66 and 68); and that all of the notes in said deed of August 1, 1913, were dated and executed on August 1, 1913; and that the said J. M. Kirkland stated in his said deposition that that was the only consideration passed for said land (S. F. 68); and that there was no consideration given and passed for the purported conveyance by the guardian of October 20, 1913, although the guardian's deed stated so.

George Berry, the District Clerk of Young County, Texas, was placed on the witness stand by the appellants, and he testified that he examined the District Court Records of Young County, Texas, and that the deed of August 1, 1913, executed by George W. Birdwell and wife, Mollie Birdwell, to J. M. Kirkland containing 80 acres of land, had never been set aside nor canceled (S. F. 132).

As above shown, the guardian had never taken steps to rescind, to cancel or set aside the deed of conveyance of Au-

gust 1, 1913, and at the time of the application to sell said land on August 27, 1913, the said land had not passed into the possession of the guardian and under the control and supervision of the guardian and the probate court, neither did the guardian nor the probate court have jurisdiction over said land subject to contract or conveyance, when the said guardian attempted to make a conveyance of the same through a guardian's deed on October 20, 1913. In *Neal v. Holt, 69 S. W. 2d 603, writ of error denied by the Supreme Court of Texas*, the appellants say that this case is directly in point, and are relying on it mostly for a reversal of this case, which holds in part:

> "The guardian, under the statutory authority to take possession of all property belonging to the ward, may be deemed to have the incidental power to bring suit to rescind the voidable sale made by his ward. Article 4163 expressly gives the guardian the right to recover possession of all property to which the ward has a 'title or claim'. But until the necessary steps are taken of rescission by suit and decree, the land could not be regarded as within the possession of the guardian and under the immediate contract and supervision of the guardian and the Probate Court. Therefore, in view of such legal situation of the land, and the terms of the guardian's application for sale, it may not be held that the land itself was in the possession and under the authority and jurisdiction of the guardian and the Probate Court subject to contract or conveyance in respect thereto by the guardian, or a purpose was presented for which a sale is authorized by the statute." * * * It is further held: "In the present case, though, the Probate Court orders in controversy were not merely voidable, but were void as without the jurisdiction of the Probate Court to entertain and make."

In the case of *Withers v. Patterson, 27 Texas 491*, the Supreme Court of Texas held:

> "Let us suppose that A., being the owner of lands, dies intestate, and his estate is committed to the county court for administration: Let us suppose that a certain tract of land belonging to the estate is sold upon the petition of the administrator, and purchased by B., that the sale is confirmed by the court, the purchase money paid by B., and title made to him by the administrator. Let us suppose that afterwards, in the progress of the same administration, the administrator applies, with all formality, for the sale of the same land, that the court orders the sale, that the administrator sells in obedience to the order, and the land is purchased by C., the sale to him confirmed, the purchase money paid, and a deed duly executed by the administrator. Has C., in such case, acquired any title to the land? Certainly not. And why? Simply because the court had no power to order the sale at which he purchased. The land did not belong to the estate. * * * All the proceedings of the court in the progress of such an administration are null and void, and may be shown to be so in any collateral proceeding in which they are relied on to support a claim of right. And in the case of a rightful administration, every order or judgment which the law has not conferred upon the court the power to make or render is a nullity, and may be impeached collaterally, by showing from the record itself the want of power in the court to make or render the order or judgment in question.

"The inclusion of property not his own, in his schedule of assets, gave no jurisdiction over such property to the bankrupt court, and the judgment and sale of such property was null and void", and subject to collateral attack. *Hornsby v. Hornsby, 70 S. W. 2d 489, Texas; Buss v. Smith, 125 S. W. 2d 712 and 714; Norse v. Shackelford, 9 F. 2d 967.*

This second federal question herein as shown above is substantial for the reason that the Probate Court of Young County, Texas, when the guardian's deed was made to said land, did not have jurisdiction over the land, and jurisdiction of the res is essential to the validity of a judgment in rem, for it is held:

> "Proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." *Colton v. Menefee, 237 U. S. 189, 59 L. Ed. 919; Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569; 12 C. J., p. 1226, Sec. 1001.*

> "Jurisdiction of the person is essential to the validity of a judgment in personam, and jurisdiction of the res is essential to the validity of a judgment in rem." *12 C. J., p. 1226, Sec. 1001.* Nor can you waive or consent to jurisdiction.

> "No waiver or consent can cure a want of jurisdiction of the subject matter." *Sinsheimer v. Simonson, 107 Fed. 898, 184 U. S. 18, 46 L. Ed. 415.*

This case at bar wherein the probate court did not have jurisdiction over the land, neither did the guardian, for the same had already been sold, and not in existence in their possession, the same is analogous to the case wherein an administrator took out an administration on a live man, wherein the dead man was not in existence, and the live man did not have notice, the court was without jurisdiction, and the judgment was wholly void, and was not due process of law.

> "The appointment of the probate court of an administrator of the estate of a living person, without

notice to him, being without jurisdiction, and wholly void; the receipt of the money by the administrator is no discharge of the debt; and the conveyance of the property by the administrator passes no title," and the same is not due process of law. *Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896.*

QUESTION 3

The third question is whether the Probate Court of Young County, Texas, could order a sale of said land through the guardian's deed in confirmation and ratification of a former deed and conveyance not permitted by statute and violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Since the conveyance of said land owned by said wards was executed by George W. Birdwell and wife, Mollie Birdwell, on August 1, 1913, and the purchase price was paid and secured to be paid by J. M. Kirkland at said time, and the deed was delivered to him, and since the guardian's deed was made to the said J. M. Kirkland on October 20, 1913, without setting aside the former conveyance, and in the said guardian's deed the consideration was never paid nor expected to be paid, but there was a complete failure of consideration, and it is, and was obvious and plain that it was the intention of all parties thereto, as in the following case of *Neal v. Holt*, that the said guardian's deed was made and executed in ratification and confirmation of the said deed of August 1, 1913, which the statutes do not permit, and rendered the said guardian's sale void and subject to collateral

attack. In the case of *Neal v. Holt, 69 S. W. 2d 603 and 609*, the court held:

"And it is concluded that, in the absence of express statutory provisions, neither the guardian nor the probate court, nor all together can ratify or confirm a conveyance of land by the ward made previous to the guardianship. * * *. The powers of the probate court, in respect to the estates of minors, and as truly estate of a person of unsound mind, are all conferred by statute. Whatever the statute authorized the probate court to do, it might rightfully do. And it is as certainly plain, that if the probate court orders a sale of land when the circumstances do not exist, which, under the law authorizes it to do so, it acts, in doing so, without authority. If the order of sale was a nullity, the confirmation of such sale could not legalize it." And *Withers v. Patterson, 27 Tex. 491 and 496*, the Supreme Court of Texas holds and quotes the same thing.

"Probate Court's ordering guardian's sale to confirm proceeding in another county condemning ward's property held unauthorized, rendering sale void." *City of Tyler v. First National Bank of Beaumont, et al., 46 S. W. 454.*

"The deed sought to be canceled is void because the application of the guardian, the order of the court, and the approval order, as well as the deed, show that the probate court had not the power to authorize the guardian to exchange the lands of the wards. Therefore the orders were subject to collateral attack." *Crier v. Cowden, et al., 251 S. W. 822. O'Connor v. Vineyard, et al., 43 S. W. 55; Harrison v. Barngrover, 72 S. W. 2d 271, writ of error refused.*

"We conclude that the order of the county court in the guardianship proceedings, authorizing and confirming the exchange of the annuity bequeathed to the minor, Dorris Commander, for the shares of stock in Fakes and Company was void on its face, because of

lack of any statutory authority therefor; in other words, because it was in excess of the powers delegated by the statutes." *Commander v. Bryan, et al., 123 S. W. 2d 1008*, further citing *Martin v. Augadahl, 247 U. S. 142*, it was held that a judgment may be attacked collaterally as void for lack of jurisdiction of the subject matter or of the person of the defendant, even when the judgment recites findings of jurisdictional facts, such as service of summons upon the defendant. Which is in keeping with the guaranty of due process of law by the Federal and State Constitutions.

QUESTION 4

Whether the guardian made a sale of said land and was benefitted and profited directly or indirectly in violation of the statute, was contrary to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

That the statement made by the guardian in the report of the sale in the Probate Court of Young County, Texas, just before the guardian's deed was made, that $512.50 in cash had been paid, was not true; because on August 1, 1913, as a part of the consideration in payment for the wards' land of 80 acres as part of the purchase price, G. W. Birdwell, guardian, accepted in payment from J. W. Kirkland two horses valued at $400.00, and $112.50 in cash; the said two horses were for the benefit and profit of said guardian, G. W. Birdwell; and said transaction rendered the judgment void in violation of a mandatory statute. That the purchase of said horses by said guardian was a direct violation of

Article 4205 of the R. C. S. of 1925, which provides as follows:

> "The guardian shall not become the purchaser either directly or indirectly of any property of the estate sold by him. If any guardian shall, directly or indirectly, become the purchaser of any property of his ward at a sale made by such guardian, upon written complaint of any person, and after service of citation upon such guardian, and upon proof, such sale shall be held void and by the court set aside by order to that effect, * * *."

In proof of same, the deposition taken of J. M. Kirkland on March 18, 1955, shows that when he purchased said land on the 1st day of August, 1913, as a part of the consideration in payment for the wards' land of 80 acres as part of the cash purchase price, G. W. Birdwell, guardian, accepted payment from J. M. Kirkland two horses valued at $400.00, and $112.50 in cash; that said deposition provides as follows (S. F. 65 and 67):

> "Int. 6. The records show the consideration for said 80 acres of land from G. W. Birdwell and wife, Mollie Birdwell, to be $2,000.00, to be paid as follows: $512.50 cash and et cetera * * *. Was the consideration recited in said deed the true consideration paid by you to G. W. Birdwell for said land?
>
> "To the 6th Int. the witness answers: Yes.
>
> "Int. 7. Was the cash consideration of $512.50 paid by you in cash to G. W. Birdwell on the date of the deed, August 1, 1913?
>
> "To the 7th Int. the witness answers: Yes.
>
> "Int. 8. Did you pay any part of said consideration in livestock?
>
> "To the 8th Int. the witness answers: Yes.

"Int. 9. Did you deliver to G. W. Birdwell on August 1, 1913, the time said deed was made, one mare named 'Ann' and one 'Stallion' as part of the cash consideration?

"To the 9th Int. the witness answered: Yes.

"Int. 10. What value was placed upon said livestock?

"To the 10th Int. the witness answered: $400.00.

That in violation of said statute, the order of sale, the confirmation order, and all proceedings of the probate court should be set aside; that said sale and orders of the court are void, the statutory provision is mandatory, and the same is within the prohibition of the statute and subject to collateral attack. In the case of *Wall v. Wall, 172 S. W. 2d 181*, holds:

"The statute prohibiting the guardian of a minor's estate from becoming a purchaser of any property of the estate sold by him, and declaring a sale to be void, is 'mandatory' and unambiguous and requires no construction * * *.

"The sale of an incompetent's undivided interest in realty to husband of incompetent's guardian is a partition proceeding was in effect a sale to the guardian within the prohibition of statute, and sale was void. Art. 4205." And in a case analogous to this is *Simpson v. Booth, 163 S. W. 2d 1080*, which holds in part:

"And that, too, only upon the guardian giving bond in an amount equal to double the value of the personal property then on hand, and the amount for which said real estate may be sold. These provisions of the statute are by the legislature expressly made mandatory, and unless followed, the sale of the ward's real estate is declared to be void. Art. 4216 * * *, the purchaser acquired no title and the owner, Annie Booth, is still the owner of her undivided interest in the land, free of

any encumbrance or laches subsequently accruing; and the guardian of the ward may not ratify or confirm the void proceedings affecting the title, and the invalidity thereof may not be waived by any acts, omissions or commission of the guardian." *Parker v. Bowers, 64 S. W. 380*, and *Bishop v. Creek, 199 S. W. 367*, construe Article 4205, violation of guardian.

When the guardian's deed was attempted to be executed on October 20, 1913, through the probate court, in confirmation and ratification of the deed of August 1, 1913, wherein the guardian, in violation of Article 4205, profited and benefitted from the sale in taking in horses as part of the purchase price for said land, that said sale was not susceptible of ratification or confirmation, for it is held in *Commander v. Bryan, 123 S. W. 2d 1008 and 1015:*

"A void judgment 'is not susceptible of ratification or confirmation, and its invalidity may not be waived'."

A further holding that said statute is mandatory, and violation of same is subject to collateral attack is in the following cases: Our Supreme Court of Texas held in *Grant v. Ellis, 50 S. W. 2d 1093:*

"We quote and adopt the following rule announced by the * * * authority, 34 C. J. 531 and 532: 'Where the constitution or a statute absolutely prohibits a court from doing a particular act, the order or judgment of the court made or rendered in violation thereof is absolutely void for want of jurisdiction and may be assailed in any collateral proceeding.'" Also, *25 Tex. Jur., p. 808, Sec. 307*, quotes: "Indeed, as a general proposition, any judgment which ignores a prohibitive statute may be regarded as void and subject to collateral attack." "What is prohibited in law is as clearly invalid as if it had been declared void." *Stallings v. Hullum, 35 S. W. 2. Supreme Court of Texas.*

The said question is substantial, for it is held: "No judgment of a court affords due process of law if rendered without jurisdiction. A judgment is void for want of due process, where the court exceeds its jurisdiction, as where it renders a judgment not authorized by the pleadings, evidence, or findings, or without service of process sufficient to bring the parties before the court." *U. S. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.*

QUESTION 5

Whether the Probate Court of Young County, Texas, in making the sale of said land, ordered the conveyance to be made when the money was paid to the guardian in compliance with the order of the court and statutes, which was not paid when the conveyance was made, nor thereafter, and caused a failure of consideration of the purchase price of said land, and rendered the sale void, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

On the 1st day of August, 1913, George W. Birdwell and wife, Mollie Birdwell, executed a conveyance to J. M. Kirkland, in consideration of Two Thousand $(2,000.00) and No/100 Dollars, to them paid and secured to be paid by J. M. Kirkland as follows: The sum of $512.50 cash in hand, and the assumption to pay three notes as follows: Two notes for the sum of $100 each, and one note for the sum of $600.00, bearing ten per cent interest, and due and payable to the Bonner Loan and Investment Company of Dallas, Texas, on November 1, 1913, 1914, and 1915 respectively; three other notes of even date herewith as follows: Two notes

for the sum of $200.00 each, and one note for the sum of $287.50, bearing eight per cent interest, and due and payable to G. W. Birdwell at Olney, Texas, on October 1, 1916, 1917 and 1918 respectively (S. F. 56).

Now in selling said 80 acres of land by said guardian through the probate court, the guardian reported the sale in words substantially as shown in said deed of August 1, 1913, and showing the same consideration, which report was on the 13th day of October, 1913, and the confirmation order shows the same consideration; and the confirmation order further stated, "It is further ordered that the said G. W. Birdwell, guardian as aforesaid, make a proper conveyance of the said land to the said J. M. Kirkland upon his compliance with the said terms of sale" (S. F. 52).

It is stated in said guardian's deed: "Now, therefore, in consideration of the premises and of the sum of $512.50 to me in hand paid, the receipt of which is hereby acknowledged and the assumption by the said J. M. Kirkland and the agreement on his part to pay off and discharge at maturity thereof one certain real estate note secured by mortgage on the hereinafter described real estate in the sum of $800.00 held by the Bonners of Dallas, Texas, and the execution and delivery to me as such guardian as aforesaid, of his three certain notes of even date herewith for the sum of $200.00 due October 15, 1915; $200.00 due October 15, 1916, and $287.50 due October 15, 1917, each bearing interest from the date at the rate of 8 per cent per annum (S. F. 57).

"Witness my hand on this, the 20th day of October, 1913.

"G. W. Birdwell, Guardian."

Now, therefore, in view of the above and foregoing facts, the guardian was ordered by the court in the confirmation order to make a proper conveyance to J. M. Kirkland upon his compliance with the said terms of sale. In violation of said court order, and in violation of the statute, Article 4216 and Article 4220 of the Civil Statutes of 1925 of the State of Texas, J. M. Kirkland did not pay the guardian anything when said guardian's deed was executed on October 20, 1913, nor at any time thereafter. The conveyance was without any consideration whatever, and there was a total failure of consideration for the entire purchase price of said 80 acres of land owned by said wards.

In corroboration of the above facts, J. M. Kirkland testified by deposition on March 18, 1955, the following:

"Int. 6. The records show the consideration for said 80 acres of land from G. W. Birdwell and wife Mollie Birdwell, to be $2,000.00 to be paid as follows: $512.50 cash. * * * Three other notes of even date herewith, (August 1, 1913) as follows: Two notes for the sum of $200.00 each, and one note in the sum of $287.50 bearing eight per cent per annum interest, and due and payable to G. W. Birdwell at Olney, Texas, on October 1, 1916, 1917 and 1918 respectively. Was the consideration recited in said deed the true consideration paid by you to G. W. Birdwell for said land?

"To the 6th Int. the witness answers: Yes.

"Int. 21. According to the record as above shown, the deed from G. W. Birdwell and wife, Mollie Birdwell, dated August 1, 1913, to J. M. Kirkland shows a total consideration of $2,000.00 that J. M. Kirkland paid for said 80 acres of land. Did you ever pay, after August 1, 1913, any more than that for the land to G. W. Birdwell?

"To the 21st Int. the witness answers: No, I did not.

"Int. 22. Was the $2,000.00 paid to G. W. Birdwell on August 1, 1913, all of the money you ever paid for the 80 acres of land?

"To the 22d Int. the witness answers: Yes, that is all." (S. F. 66 and 68.)

In *Neal v. Holt, 69 S. W. 2d 603 and 609*, held:

"And, in another point of fact, as found by the trial court, as respects the purchaser, there was failure of compliance with the terms of the sale, requiring as to him the setting aside of the order of confirmation of the sale of the ward's land. It is expressly provided by the statute as a prerequisite of conveyance to the purchaser the compliance by the purchaser with the terms of purchase. Article 4220, R. S.

"We believe the mineral deed from Wallis to Boucher, not being based upon any consideration, was and is void." *Boucher v. Wallis, 236 S. W. 2d 519 and 421; Simpson v. Booth, 163 S. W. 2d 1080.*

"Due process of law is essential to a valid judgment, and a void judgment confers no rights under the due process clauses." *Texas, Commander v. Bryan, 123 S. W. 2d 1008; 16A C. J. S., p. 835, Sec. 625.*

QUESTION 6

Whether the suit on the surety companies' bonds as applied to the appellants were liable to them on the ground that all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, were void, and estopped the bonding companies from questioning the jurisdiction of the court and the invalidity of the record, and an adverse ruling thereon was in violation of the Due Process

Clause of the Fourteenth Amendment of the Constitution of the United States.

In the above and foregoing we see that under Question 1, the said guardian removed the guardianship from Bell County to Young County, Texas, under the proceedings and orders of the court which were illegal and void; and under Question 2, we note that the guardian attempted to convey the land of the wards, appellants, wherein the land was not in the possession and under the control and jurisdiction of the probate court and guardian, subject to contract and conveyance, which attempted conveyance by the orders of the court, rendered all the proceedings and orders of the court void and subject to collateral attack; and that under Question 3, we see that the said guardian, in attempting to make the conveyance of the wards' land, did so through the probate court in confirmation and ratification of the former deed of August 1, 1913, which orders of the court and deed were subject also to collateral attack, and void; and that under Question 4, we see that the guardian was guilty of directly or indirectly profiting from the wards' real estate sale in violation of the statute and court order, which rendered said sale void; and that we also see under Question 5, at the time of the attempted sale by the guardian to J. M. Kirkland by orders of the court and guardian's deed that there was a complete failure of consideration of the whole purchase price for the said land, which also rendered the sale void; and that from all of the above and foregoing, we see that all of the proceedings, orders and judgments of the Probate Court, in-

cluding the order of sale, report, confirmation order, and deed were all void and subject to collateral attack.

Now the Court of Civil Appeals has ruled and sustained the surety companies' motion for summary judgment in that the orders releasing the said sureties on the bonds were barred by the 4 year statute of limitation for they failed within 4 years when the wards reached their majorities to come into court and sue and set the orders aside releasing the sureties. That this decision and ruling by the Court of Civil Appeals has the effect of overruling all of the appellants' points of error and issues and questions herein set up and in the trial court, Court of Civil Appeals, and the Supreme Court of Texas, and the decision is that all of the proceedings in the Probate Court of Young County, Texas, including the order of sale, confirmation order and deed, and more especially the orders releasing the surety companies from all liability are valid and subsisting. This holding and final decision of the Court of Civil Appeals has forced the appellants to set up all of the above and foregoing questions, which were points of error in the lower courts. This ruling of the Court of Civil Appeals is in direct conflict and against all pre-existing law as cited and set up in the above and foregoing cases in the said questions, and is a direct violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

According to the law and statutes, all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, including the order or orders releasing the said bonding companies are void and subject to collateral attack; *and*

the 4 years statute of limitation nor any other statute of limitation does not run against a void order.

> "A void judgment has been termed waste paper, an absolute nullity; and all acts performed under it are also nullities. Again, it has been said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. 'It is good nowhere and bad everywhere,' and neither lapse of time nor judicial action can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived." *Commander v. Bryan, 123 S. W. 2d 1008 and 1015; 25 Tex. Jur., Sec. 254, p. 693.*
>
> "Nor will a void judgment be given effect of res adjudicata in a subsequent suit involving the same subject matter." *Ruby v. Davis, 277 S. W. 430.*
>
> "Due Process Clause in the Fifth and Fourteenth Amendments should be construed in the light of pre-existing law." *De Pauw University v. Brunk, 53 F. 2d 647, affirmed 52 S. Ct. 405, 285 U. S. 527, 76 L. Ed. 924.*

Furthermore, since plaintiffs or appellants have heretofore shown that the orders, judgments and proceedings of the Probate Court of Young County, Texas were all void, it renders the said American Surety Company liable on the said guardian's three notes all in the sum of $687.50 with interest added, on account of the defalcation of the guardian. It is held in *28 C. J. p. 1296, Sec. 4997:* "Estoppel * * * The guardian and the sureties are estopped to question the jurisdiction of the court, under the proceedings of which the guardian by the bond was enabled to obtain possession of the wards' money. After the sale of the wards' real property has been had, and the guardian has received the proceeds

thereof, the sureties on the special bond given as a prerequisite to the sale, are estopped to deny the validity of the guardian's appointment, or of the sale proceedings," and cases therein cited.

In addition, since the guardian was ordered to make a new bond on the 4th day of April, 1910, when the American Bonding Company of Baltimore asked the court to be released from the guardian's bond, and the guardian failed to make a new bond until August 16, 1913, and on August 1, 1913, the said guardian and wife executed a deed to the said J. M. Kirkland in consideration of $512.50, of that amount $112.50 represented cash, and $400.00 represented the value of two horses; that said guardian profited directly or indirectly from the sale of said land and horses in violation of said statute, and appropriated and converted the same to his own use and benefit, which rendered the said American Bonding Company of Baltimore liable to said appellants for said amount, while the said surety company was on the guardian's bond, before another surety qualified.

It is held in *Gann v. Kern, 249 S. W. 878 and 881, Texas:* "Both the principal and sureties on a guardian's bond are estopped to deny the recitals therein. A recital in a guardian's bond of his appointment estops both the guardian and the surety to deny it, and they cannot question the jurisdiction of the court, under the proceedings of which the guardian by the bond was enabled to obtain the possession of the ward's money. *Minchew v. Case, 143 S. W. 366, Tex. Court of Civil Appeals; Parker v. Campbell, 21 Texas 763, Sup. Court; Abilene State Bank v. United States Fidelity & Guaranty Co., 37 S. W. 2d 815 and 818,* holding

guardian and surety could not set up invalidity of guardianship proceedings.

"The sureties on a special bond given as a prerequisite to the sale are estopped to deny the validity either of the guardian's appointment or of the sale proceedings." *39 C. J., p. 371, Sec. 206*, and in cases therein cited.

QUESTION 7

Whether the suit on the surety companies' bonds as applied to the appellant was lost by limitation when the wards, failed to bring suit on the bonds within 4 years after they reached their majorities, but did bring suit on the bonds less than four years after the guardian died and before the guardianship closed, and an adverse ruling on same was violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The Court of Civil Appeals held: The period during which the plaintiffs should have filed their suit therefor was within four years after they reached their respective majorities, the four-year statute of limitation being applicable. * * *

(continued on Page 20, Second Paragraph at top.)

"Giving the plaintiffs the benefit of every reasonable inference which properly could be drawn in favor of their petition, we believe that it is nevertheless conclusively shown that their cause of action against the bonding companies has been lost by limitation."

This suit was filed in the Probate Court of Young County, Texas, on the 25th day of February, 1955, in the nature of a bill of review in a direct attack to set aside the invalid and void orders in order to determine the liability of the pur-

chasers of the guardianship land, and in order to determine the liability of the defendant bonding companies herein, and the suit was brought in the District Court of Young County, Texas, on the 13th day of May, 1955, and was brought in both courts, less than four years after the death of the guardian and before he was discharged, and was brought in the latter court in the nature of trespass to try title, to recover on the land, purportedly conveyed by the guardian, as their interest might appear, and in the alternative on the bonds.

It is shown by the record that G. W. Birdwell was duly appointed and qualified as guardian of the estate of the wards, appellants, in Bell County, Texas, on August, 15th, 1906, after the wards were entitled to an estate from their grandfather. It was sworn to by the plaintiffs in their motion for summary judgment, which has not been controverted or denied that G. W. Birdwell, their father and guardian, died on the 17th day of June, 1951, insolvent, after having dissipated all of the money received out of the said wards' estate, from their grandfather. That while their father was guardian, he never did file an annual account, nor have an accounting with the wards, appellants, nor did he ever file a final account with the court, and was never discharged as guardian as long as he lived, and died on said date while he was still guardian. And as shown above, that suit was filed in both courts within less than four (4) years after the death of said guardian.

When a minor ward arrives at the age of 21 years, or a female ward marries, limitations do not start to run against

them, or each of them, for a recovery on the bonds, until the guardian is discharged. In the case at bar the guardian died on the 17th day of June, 1951, as shown by record, and according to law, that is when he was discharged, and the statute of limitations did not begin to run against the plaintiffs until that time, which is shown under *Article 5528 of the R. C. S. of Texas.* The Supreme Court of Texas held in the case of *Allen v. Stovall, 63 S. W. 863*, that:

> "Article 5528, provides that all suits on the bond of any guardian shall be commenced and prosecuted within four years next after the death, removal, resignation or discharge of such guardian, and not thereafter; and Article 4296 declares that when a minor ward arrives at the age of 21 years, or a female ward marries, the guardianship shall be immediately settled and the guardian discharged. Held, that, where a guardian has not been discharged, the fact that one of the wards married and another had become of age more than 4 years before instituting a suit for breach of the guardian's bond did not bar the action since the statute runs only from the guardian's discharge."

In *Whitfield v. Burrell, 118 S. W. 156*, holds by Article 5529, which defendants insist is applicable to these provisions, it is provided:

> "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward. The 'every action' in this Article does not include nor mean the demand by the probate court of the guardian, as in these instant proceedings, for a final accounting of his transactions about the estate of his ward. * * * neither does it provide that where a guardian failed in his duty to file such account immediately

> upon the wards' arriving at the age of 21 years, the lapse of any given period of time thereafter furnished a bar to the enforcement of an accounting by the probate court * * *. We are of the opinion that neither the four nor the two years statute of limitation would apply in this case."

If a guardian dies, the statue is clear that limitation would run from that event * * *. *Marlow v. Lacy, Supreme Court of Texas, 2 S. W. 52; Ford v. Wheat, 36 S. W. 2d 712, Com. of App., adopted by Supreme Court; Massie v. De Shields, 62 S. W. 2d 322, writ refused,* further holds:

> "Where suit on guardianship bonds was commenced and prosecuted within statutory period, equitable plea of stale demand held not available (Art. 5528)." And further held: "four-year period for suit on guardianship bond held to commence running from date of probate court's order discharging guardian." *Martinez v. Guierrez's Heirs, 172 S. W. 766 and 770.*

Suit cannot be brought against the sureties on the guardian's bond until the guardian is discharged. "No suit on the bond of an administrator to make him and his sureties responsible for waste or misappropriation of assets can be maintained until after the administration is discharged." *Bain, et al. v. Coats, et al., Com. of App., 244 S. W. 130.* "Creditors may not recover on the bond of an executor or administrator for his failure to pay their claims while the administration is still pending," all of the above applies to guardians. *Wiren v. Nesbitt, 20 S. W. 128; 14 Tex. Jur., 438, Sec. 627.*

"By virtue of this statute (Art. 5528), limitation commences to run in favor of the obligors, not from the date

when the fiduciary relation ceases, but from the date when the court decrees that the guardian has resigned, been removed or discharged. In the event of the death of the guardian (as in our case at bar), however limitation runs from the date thereof." *21 Tex. Jur. p. 408, Sec. 130.*

Since the Court of Civil Appeals held that the plaintiffs' cause of action against the bonding companies has been lost by limitation, and that the period during which the plaintiffs should have filed their suit therefor was within four years after they reached their respective majorities, and the four-year statute of limitation being applicable, is in direct conflict with all pre-existing law, including common law and statutory law on the subject, and is in direct variance and in conflict with the Supreme Court case of *Allen v. Stovall, 63 S. W. 863*, and the Supreme Court case of *Marlow v. Lacy*, and the Supreme Court case of *Ford v. Wheat, 36 S. W. 2d 712*, and is in further conflict and variance with *Whitfield v. Burrell, 118 S. W. 156;* and *Massie v. Shields, 62 S. W. 2d 322*, and all other cases cited therein, and in all cases on the subject not cited herein. And in view of the above and foregoing, the appellants say that the same involves a substantial Federal Question, and is a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and further "Due process of law is essential to a valid judgment, and a void judgment confers no rights under the Due Process Clauses." *16A C. J. S. p. 835, Sec. 625; Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14.*

QUESTION 8

Whether the two deeds in question were void, and the oil and gas mineral rights were severed from the land, give the appellants the right to acquire the said minerals thereunder and a decision adverse thereto is in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Civil Appeals held among other things:

> "Grant of such 'unsevered' estates delivers the same to a grantee, whose adverse possession of the surface extends to and includes an adverse possession of the mineral interest thereunder which had never been separated or severed from the surface estate, and where such adverse possession sets the limitation statutes in motion to so effectively to mature title to the surface in a claimant, said statutes are likewise in motion so as to effectively to mature title to the unsevered mineral estate thereunder".

The appellants claim that there was a severance in this case and the law is not properly applied to the facts.

We find from the record that George W. Birdwell, guardian of said wards, plaintiffs, sold one-fifth (1/5) of 2496 acres of land inherited from their grandfather, Wilson Willingham, to William Willingham for the sum of $1,550.00 through the probate court of Bell County, Texas, on December 14, 1909, alleging that the same was sold for the support and maintenance of said wards (S. F. 33). On August 19, 1911, George W. Birdwell, took the sum of $1,100.00 in money and notes, and purchased the said 80 acres of land now in question, from Ed Watson and wife,

Jodia Watson, and took the said 80 acres of land in his own name in said deed; that he was holding the same in trust for his said minor wards, the appellants herein. That in the said Ed Watson deed to said guardian, there was a severance of the mineral interest, one-fourth (¼) of same was reserved in favor of the grantee, Ed Watson and wife, but it was actually belonging to the Belknap Coal Company, and three-fourths (¾) of said mineral interest, which included coal, gas and oil, was conveyed at said time to the said George W. Birdwell, who held it in trust for said wards, (S. F. 55), in the following words: "* * * Thence West * * * containing 80 acres of land, and an undivided one-fourth interest in all mineral rights in the above described land is hereby reserved, it being our intention to only convey to the said Birdwell an undivided three-fourths interest in the mineral rights to said land, which is to include coal, gas and oil, or any other minerals that may be found beneath the surface of said land". That said deed from Watson, et ux., to Birdwell is the common source of title.

That since we have shown heretofore that the deed executed by G. W. Birdwell and wife, Mollie Birdwell, to J. M. Kirkland, on August 1, 1913, was void without an order of the court authorizing same, wherein the notes were made payable to G. W. Birdwell, guardian of William and Lee Birdwell, minors, now Lee Green and William Birdwell, was void in violation of Art. 3553, which provides: "Except as hereinafter provided, no sale of any property of an estate shall be made without an order of court author-

izing the same * * *". In the case of *Loving v. Clark, 228 S. W. 590 and 593*, holds: "We think Article 3553, R. C. S. of 1925, Texas, providing that no sale of any property belonging to an estate shall be made by an executor or administrator without an order of the court authorizing the same, applies to guardianship. * * * It has been held in this state an administrator's sale, in the absence of an order of the probate court, authorizing the sale, is void, and may be attacked in a collateral proceeding"; *Kelly v. Neal, 111 S. W. 2d 1122; Gallemore v. Owen, 69 S. W. 2d 469.* Appellants have also shown that the attempted sale of the guardian, G. W. Birdwell, through the Probate Court of Young County, Texas, of the 80 acres of land in question, on the 20th day of October, 1913, was void and subject to collateral attack, wherein all of the proceedings were void which is shown in Question 1, through Question 6.

It is further shown that as a matter of record, Lee Birdwell, now since marriage, Lee Green, appellant, in February, 1914, was sixteen (16) years of age when she was married, and in February, 1919, she was 21 years of age, and William Birdwell, as a matter of record, was 21 years of age in the year 1925. The statute of limitations, being Article 5518 of the R. S. of 1925, does not run against minors or people under disability, who are entitled to sue for recovery of real property, and this includes married women under 21 years of age. And in *Huling v. Moore, 194 S. W. 188*, holds: "The statute of limitation to sue for the recovery of real property does not run against a married woman until she is 21 years of age."

And in further view of the fact that on November 6, 1918, the Belknap Coal Company partitioned this 80 acres of land, the mineral interest therein with J. M. Kirkland. In partitioning this mineral interest it was set off to J. M. Kirkland 30 acres out of the North portion of this 80 acre block or survey, and to the Belknap Coal Company 50 acres out of the South portion of said survey. (S. F. 104). Since when J. M. Kirkland took purported possession of said land from George W. Birdwell and wife, by deed dated August 1, 1913, and again under the purported guardian's deed of October 20, 1913, and the mineral interest as aforesaid, was partitioned on November 6, 1918, adverse possession or limitation could not run against the appellants herein during said time, for they were both minors, as shown before. Now in partition of their estate, we see that the Belknap Coal Company owned one-fourth of the 80 acres, and the wards, the appellants, owned three-fourths of same as shown in the Ed Watson and wife's deed to them, and that all were cotenants, and the partition was a severance of their mineral rights, for it is held in *Garza v. De Montalvo, 217 S. W. 2d 988 and 992, Sup. Ct. of Texas:*

> "As a matter of law it must be concluded that the partition agreement was intended to segregate and did segregate the mineral interest of the parties".

Since adverse possession or limitation never did start to run against said minors by J. M. Kirkland when the minerals were partitioned at said time in 1918, and the minerals were severed from the land in said partition deed from the land, and since there is no pleading or evidence that anybody has had dominion or possession of said min-

erals or drilled into or extracted them from the ground, it shows that the appellants are still entitled to them, since appellants have aready shown that the deed of August 1, 1913, and the guardian's deed of October 20, 1913 were void.

It is held in *31-A Tex. Jur. p. 43, Sec. 15:*

> "Adverse possession. After severance of the surface and the mineral estate, the possession of the one will not ripen into a limitation title of the other. So, after the severance of the oil and gas estate, adverse possession of the surface is not adverse possession of the minerals. When the adverse entry is made after the severance, something more than the use of the surface is required. Such dominion must be exercised over the minerals as well, which will be notice to the owner of the mineral estate that the possessor of the surface estate is claiming the minerals also".

It is held in *Watkins v. Certain-Teed Prod. Corp., 231 S. W. 2d 981:*

> "After the severance of the oil and gas estate, mere adverse possession and use of the surface does not constitute adverse possession of the minerals under the surface".

In addition, it is shown in *Stubbs v. Lowrey's Heirs, 253 S. W. 2d 312*, on March 12, 1925, R. A. Webb conveyed to N. A. Lowrey an undivided one-half of the minerals in and under a tract of land in Knox County, Texas. At the time of the execution and delivery of the above conveyance, there was an outstanding indebtedness against the land which was secured by a deed of trust. On February 5, 1935, a substitute trustee, acting under the powers granted in the deed of trust, sold said land to A. D. Bruce. Thereafter

Bruce conveyed the land to G. F. Stubbs. In this case the deed of trust lien ceased to exist four years after the maturity of the debt, at which time it was sold by said substitute trustee, and was therefore void. The court held:

> "The execution of the deed from Webb to Lowrey conveyed one-half of the minerals to the land constituted a severance as between the surface of the land and the minerals thereunder, and therefore, mere adverse possession and use of the surface does not constitute adverse possession and use of the minerals. * * *We hold the trustees' deed to Bruce did not convey title to the minerals and was void upon its face".

Furthermore, it is stated in *Campsey v. Jack County Oil and Gas Association, 328 S. W. 2d 912*, on or about the 30th day of March, 1936, a purported deed was executed by S. V. Stark purporting to act as trustee of the Jack County Oil and Gas Association, and which deed purported to convey to W. J. Cannon all of the oil, gas and other minerals which said association owned in a certain described tract of land, and that the defendant, Lon Campsey, is claiming under said deed. The court found the said trustee, S. V. Stark, never had authority to convey said land for the association, and therefore the deed was void. The defendant in that case contended that since he and his predecessors have been in peaceable and adverse possession of the land, using same for all adaptable purposes, openly and adversely, for more than ten years, the plaintiff is barred by the three, four, five and ten year statutes of limitations, which is the same thing the defendants are contending for in the case at bar before us. But the defendants in that case never did allege and prove that they had ad-

verse possession and ominion over the minerals, the same as this case of the appellants herein. The court held:

> "The evidence does not show that any oil, gas or other minerals have ever been produced on the land, or that any, or any wells have been drilled thereon. Under the record before us, we must apply the rule that where there has been a severance of the minerals and mere possession of the surface is not such possession of the minerals as to perfect limitation title. Such dominion must be exercised over the minerals as will constitute notice to the owner of the mineral estate that the possessor of the surface is claiming the minerals also".

In the way of a summary under this quesetion, we see that the deed of August 1, 1913, executed by the guardian and wife, was void, and the deed executed by the guardian by order of the probate court on October 20, 1913, was also void, and the partition deed executed on November 6, 1918, by Belknap Coal Company, cotenants with appellants, which was partitioned with J. M. Kirkland, and which severed the mineral rights, and all deeds were executed herein while appellants were under 21 years of age before adverse possession could start on the surface of the land, and since there was no adverse possession and dominion over the minerals, the appellants as a matter of right are entitled to their portion of the mineral rights of three-fourths (¾) of the said 80 acres of land; and there should be an equitable partition of the same.

In addition, under the equitable partition doctrine, the Belknap Coal Company's interest should be set off in the North portion of said 80-acre tract, (S. F. 104), in favor

of J. M. Kirkland, heirs and assigns in the amount of 20 acres, it being their interest of one-fourth of the mineral rights, which the Belknap Coal Company conveyed to Kirkland. Said company would be estopped to deny making said conveyance or partition. The other 50 acres in the South part of said land should be adjudged in favor of the appellants herein since according to record there is no producing well or wells on said land, and it all appears to be equal in value over the entire tract; and that the 10 acres within the North portion of said tract with J. M. Kirkland, heirs and assigns, should be adjudged in favor of the appellants, thereby making the appellants having 10 acres of undivided interest with said J. M. Kirkland, and they would be therefore tenants in common as to said mineral rights in the said 20 acres of land. That plaintiffs acquiesce in and ratify that kind of adjudication if permitted by the court under the equitable partition doctrine. *Arnold v. Cauble, 49 Tex. 527.*

It is held in *Maverick v. Burney, 32 S. W. 512:*

> "In many jurisdictions that the deed of a tenant in common to a specific parcel of land held in common by him with others is absolutely void. But it is settled in this court by a long line of decisions that such a deed is good as between the parties, and is voidable only by the cotenants of the grantor, and not by them except insofar as it may affect their rights." *Thomas v. Southwestern Settlement and Development Company, 123 S. W. 2d 290;* and if necessary the appellants have the right to repartition their mineral interests.
>
> "Cotenants not joined in voluntary partition of land can sue to set aside the partition and for a repartition

in an action in which all of the allotments and all of the allottees and those holding under them are brought before the court". *Joyner v. Christian, 113 S. W. 2d 1229; Lasater v. Ramirez, Com. App., 212 S. W. 935.*

In the alternative, if the appellants are mistaken in the fact that when the said partition deed was made on November 6, 1918, while the appellants were minors, that it was not a severance, then the appellees are still liable for excluding the appellants from the partition deed, who did not know of their interest and did not acquiesce in the adverse possession, if there was any, and knowledge cannot be imputed to sustain acquiescence.

The appellants swore in their suporting affidavit for summary judgment, (Tr. 55), the affiants further say that during the lifetime of their father that there existed a relationship of trust and confidence between them, and they placed utmost confidence in him as long as he lived; that the affiants were ignorant of the existence of their causes of action up until their father's death, and up until about the time they filed suit, and when they took the deposition of J. M. Kirkland (on the 18th day of March, 1955) and later. They further swore, (Tr. 59), that the plaintiffs, and each of them, were illiterate, had no education * * *. They had very little, if any, business experience. After the latter part of October, 1913, plaintiffs left and moved away from Young County, Texas, and traveled for several years with their father in a wagon; and were not accessible to the county records, and they never lived in

Young County, Texas, again. That plaintiff, Lee Green, married on or about the 9th day of February, 1914, and her husband took care of her from said time. That the affidavits herein supporting their summary judgment were not controverted or denied by the appellees, or either of them.

It is held in *Scoggins v. Lee, 92 S. W. 2d 1116:*

> "Where heirs partitioned land excluding one heir, who did not know of his interest, excluded heir remained a tenant in common, since knowledge is necessary to acquiescence, and court will not impute knowledge to sustain acquiescence."

The court further held:

> "It is not contended by any one the appellee had any actual knowledge of the partition of the land in controversy between the heirs in 1912. The evidence affirmatively shows that he never came back to Texas after leaving in 1907, until a short time before filing of this suit in the court below. The evidence also affirmatively shows that he knew nothing of the property or his interest therein until a short time before the filing of this suit. It follows, then, that knowledge of appellants Scoggins' holding must in some manner be brought home to Lee, appellee. * * * In Stephens v. House, 248 S. W. 30, 33, the Commission of Appeals, in discussing the doctrine of acquiesence relating to the presumption of a deed, says: 'Knowledge being held necessary to establish acquiescence, we are not willing to extend the doctrine to those cases where it is necessary to impute knowledge to sustain acquisence. * * * But in this case, where the parties do not reside in the neighborhood of the land, and where they know nothing of it, residing in another county, and there being not even a scintilla of evidence that their ances-

tors had any knowledge of the claim, knowledge should not be imputed to them of the adverse claim'."

Ignorance of the Existence of Cause of Action

"Generally speaking, and in the absence of fraud, a plaintiff's ignorance or inability to learn of his cause of action will not prevent the statute of limitation from running * * *. 'An exception to this rule is sometimes applied where there has been a relation of trust and confidence between the parties'." *28 Tex. Jur. 144 and 145, Sec. 61.*

In *State v. Jones, 315 S. W. 2d 433 and 436*, the court held:

"'Ordinarily a person's ignorance of his cause of action will not prevent the statute of limitations from running. But there are exceptions to the rule. One of the recognized exceptions arises where there has been a relation of trust and confidence between the parties, as sometimes arises in matters pertaining to principals and agents, or trustees', and cases therein cited.

"For another example: 'Where, pursuant to a contract between an attorney and a bank, the attorney was entitled to ten per cent of a judgment recovered, a trust relationship existed between the parties, and limitation did not run against the attorney's cause of action until he learned that the bank breached the trust by collecting the judgment and failing to account'." *Cobb v. National Bank of Decatur, Supreme Court of Texas, 42 S. W. 770.*

Since the ruling and decision of the Court of Civil Appeals is in conflict and at variance with the above decisions, it is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

QUESTION 9

Whether appellants' motion for summary judgment, supported by their affidavits, depositions, pleadings and records in the case, which showed no genuine issue of fact to be determined, and which motion was not controverted by the affidavits of the defendants, appellees, and a decision adverse to same is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The plaintiffs, in their motion for a summary judgment, seek to recover upon their claim as pleaded in their second amended original petition in trespass to try title, and in their first amended supplemental petition, and in their supporting affidavits and depositions. The pleadings, depositions on file, together with such supporting affidavits and records show that, * * * there is no genuine issue to any material fact, and that these plaintiffs, the moving parties, are entitled to a judgment for full recovery upon such claim against said defendants, as a matter of law.

That in view of the fact that the affidavits to summary judgment, (Tr. 53-59), with reference to the bonding companies and all of the appellees hereir, is made out in full against them, and since neither the said surety companies nor any of the appellees have set up any counter-affidavits to said motion, nor contested the same, as a matter of law, the plaintiffs have a right of recovery against them, since there is no genuine issue of fact to be determined; and that the said affidavit sets up all of the facts and cause of action

to be determined herein, which reference is hereby made, without setting out the same herein.

The defendants at the hearing filed no counter-affidavits, and made no showing that affidavits were available; summary judgment should be granted as a matter of law. In the case of *Rolfe v. Swearingen, 241 S. W. 2d 236*, the court held:

> "Where plaintiffs, at hearing on defendants' motion for summary judgment, filed no counter-affidavits, and made no showing that affidavits were available, they, in effect, admitted facts alleged in defendants' sworn affidavits supporting motion, and summary judgment was properly granted".

The defendant, A. B. Larrimore, herein, filed a sworn answer, setting up various pleas of limitation in resistance to the plaintiffs' motion for a summary judgment it did not amount to a counter-affidavit,. (Tr. 88). In the case of *Be son v. Harrell, 324 S. W. 2d 620*, the court held:

> "Sworn answer filed by plaintiffs in resistance of defendants' motion for summary judgment did not amount to a counter-affidavit".

Appellants ask the court when and if they grant them a hearing herein, that the court sustain the above and foregoing questions and issues in favor of appellants and give them title and possession of said land and three-fourths of its minerals as their interest might appear under their points, questions and pleadings, and summary judgment, in the alternative, appellants ask the court to render them a decision on the bonds as heretofore shown.

CONCLUSION

The appellants have tried to show the court and cite cases to sustain the jurisdiction and to include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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PROOF OF SERVICE

I, Sidney E. Dawson, one of the attorneys for William Birdwell and Lee Green, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of April, 1961, I served copies of the foregoing Statement of Jurisdiction to the Supreme Court of the United States on the several parties thereto, as follows:

On J. M. Kirkland, et al., and American Bonding Company of Baltimore, et al., Appellees, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

Messrs. Jennings & Montgomery
P. O. Box 927
Graham, Texas

Messrs. Bullington, Humphrey, Humphrey & Fillmore
910 City National Bank Building
Wichita Falls, Texas

Messrs. Dawson & Penix
Wichita National Building
Wichita Falls, Texas

Messrs. Thornton & Thornton
First National Bank Buildi g
Olney, Texas